

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

9 FRANCISCO AZEVEDO,) 3:05-cv-195-BES-RAM
10 Plaintiff,)
11 v.) **ORDER**
12 NORTHLAND INSURANCE CO., et al.)
13 Defendants.)

15 Currently before the Court is Defendant RDK Management, Inc., dba Kaufman and
16 Kaufman Insurance's ("RDK") Motion to Strike GM Transport's ("GM") Answer and Cross-
17 Complaint and Motion to Dismiss (#91), which was filed on December 29, 2005. GM filed an
18 Opposition (#119) on February 15, 2006, and RDK filed a Reply (#132) on March 8, 2006.

19 Also before the Court is Defendant Transwestern General Agency's ("Transwestern")
20 Motion to Dismiss GM's Cross-Complaint (#94), which was filed on December 30, 2005. GM
21 filed an Opposition (#118) on February 15, 2006, and Transwestern filed a Reply (#134) on
22 March 13, 2006.

I. BACKGROUND

24 This case involves an insurance contract dispute. Plaintiff Francisco Azevedo
25 ("Azevedo") seeks to recover benefits under the policy of his employer GM. According to
26 Azevedo, on September 25, 2002, Northland, a licensed insurance company through its agent
27 RDK and/or Transwestern, sold a commercial auto insurance policy to GM. In September
28 2002, the Northland policy provided uninsured/underinsured ("UM/UIM") policy limits of

1 \$30,000.00. According to Azevedo, on October 31, 2002, the Northland policy was modified
2 to provide UM/UIM policy limits of \$1,000,000.00. According to Transwestern, it reduced the
3 UM/UIM limits back to \$30,000 effective December 12, 2002. Azevedo disagrees.

4 On February 6, 2003, Azevedo, a GM truck driver, was involved in a motor vehicle
5 accident in Missouri and suffered severe injuries. At the time of the accident, Azevedo was
6 an insured under GM's insurance policy with Northland.

7 On March 25, 2004, Azevedo brought this suit naming Northland, Transwestern, RDK
8 and GM as defendants. In his complaint, Azevedo asserted seven claims: (1) Breach of the
9 Duty of Good Faith and Fair Dealing by Northland; (2) Misrepresentation by Northland; (3)
10 Fraud by Northland; (4) Breach of Nevada Insurance laws by Northland and Transwestern; (5)
11 Waiver and Estoppel against Northland; (6) Negligence against RDK and Transwestern; and
12 (7) Conspiracy by RDK, Northland and Transwestern. No claims were made against GM.
13 Azevedo's complaint states that "GM is named herein as a party necessary to the litigation
14 pursuant to NRCP 19(a), but plaintiff makes no allegations against it, seeks no relief from it,
15 and no answer is required." (Complaint ¶ 5.) On April 1, 2005, Northland filed a Notice of
16 Removal of this action from the Second Judicial District Court of Nevada, in and for the County
17 of Washoe, to this Court.

18 On December 8, 2005, GM filed its Answer and Cross-Complaint asserting thirteen
19 claims: (1) Breach of Insurance Contract against Cross-Defendants Northland and
20 Transwestern; (2) Waiver and Estoppel against Cross-Defendants Northland and
21 Transwestern; (3) Breach of the Duty of Good Faith and Fair Dealing by Cross-Defendants
22 Northland and Transwestern; (4) Unjust Enrichment/Quantum Meruit against Cross-
23 Defendants Northland and Transwestern; (5) Breach of Fiduciary or Fiduciary-Like Duty
24 against Cross-Defendants RDK, Northland and Transwestern; (6) Negligence Per Se against
25 Cross-Defendants Northland and Transwestern (NRS 686A.310); (7) Fraud against Cross-
26 Defendants Northland and Transwestern; (8) Intentional Misrepresentation against Cross-
27 Defendants RDK, Northland and Transwestern; (9) Negligent Misrepresentation against Cross-
28 Defendants RDK, Northland and Transwestern; (10) Conspiracy against Cross-Defendants

1 RDK, Northland and Transwestern; (11) Breach of Nevada Insurance Laws against Cross-
 2 Defendants RDK, Northland and Transwestern; (12) Negligence against Cross-Defendant
 3 RDK; and (13) Negligence against Cross-Defendant Transwestern.

4 On December 30, 2005, Transwestern filed its Motion to Dismiss asserting that GM (1)
 5 lacks capacity to pursue the cross-claims; (2) cannot recover damages; (3) lacks standing; and
 6 (4) has not properly pled its claims.

7 On February 16, 2006, GM filed its Opposition asserting (1) The Court has subject
 8 matter jurisdiction over all causes of action alleged against Transwestern; (2) GM has capacity
 9 to sue Transwestern; (3) GM's cause of action against Transwestern cannot be dismissed for
 10 failure to state a claim upon which relief can be granted; and (4) GM sufficiently pled a claim
 11 for waiver and estoppel.

12 On March 13, 2006, Transwestern filed its Reply asserting that GM (1) Lacks capacity
 13 to bring suit; (2) Lacks standing to assert damages on behalf of Azevedo; and (3) Fails to
 14 properly plead its claim

15 II. ANALYSIS

16 **A. RDK's Motion to Strike GM's Answer and Cross-Complaint and Motion to Dismiss** 17 **(#91).**

18 The overarching issue presented here is whether GM was properly joined to this action
 19 such that its Answer and Cross-Complaint were warranted to the extent necessary to avoid
 20 being stricken pursuant to a Fed. R. Civ. P. 12(f) motion to strike.

21 **1. Sufficiency of the joinder under Fed. R. Civ. P. 19.**

22 In relevant part, Fed. R. Civ. P. 19(a) provides that:

23 [a] person who is subject to service of process and whose joinder will not deprive
 24 the court of jurisdiction over the subject matter of the action shall be joined as
 25 a party in the action if (1) in the person's absence complete relief cannot be
 26 accorded among those already parties, or (2) the person claims an interest
 27 relating to the subject of the action and is so situated that the disposition of the
 28 action in the person's absence may (i) as a practical matter impair or impede the
 person's ability to protect that interest or (ii) leave any of the persons already
 parties subject to a substantial risk of incurring double, multiple, or otherwise
 inconsistent obligations by reason of the claimed interest. . . . If the joined party
 objects to venue and joinder of that party would render the venue of the action

improper, that party shall be dismissed from the action. FED. R. CIV. P. 19(a).

2 Fed. R. Civ. P. 19(b) provides that if it is not feasible for the court to join a person
3 meeting the requirements of Fed. R. Civ. P. 19(a), the court:

. . . shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court [in determining whether a party is indispensable] include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. FED. R. CIV. P. 19(b).

In determining whether or not a party is indispensable, factual evidence is required; mere conclusory statements as to a party's indispensability are not enough. See Imperial v. Castruita, 418 F. Supp 2d 1174, 1178 (C.D. Cal. 2006). Here, Azevedo's complaint states merely that "GM is . . . a party necessary to this litigation pursuant to NRCP 19 (a) . . ." (Complaint ¶ 5.) The Complaint contains no evidentiary support whatsoever for the claim that GM is either necessary or indispensable. The Complaint itself acknowledges the gratuitous nature of GM's inclusion in so much as it states that "plaintiff makes no allegations against [GM], seeks no relief from [GM], and no answer is required." Id. GM claims that its answer and Cross-Complaint cannot be stricken because it was named as an indispensable defendant in the Complaint. (Opp'n to Def. RDK Management, Inc. Mot. to Strike GM's Answer and Cross-Compl. and Mot. to Dismiss 2.) GM's assertion of its status as an indispensable party, however, is equally unsupported by statements of fact. Therefore, the Court cannot find that GM has been joined to this action under Fed. R. Civ. P. 19(a).

23 | 2. Sufficiency of joinder under Fed. R. Civ. P. 20.

24 Here, Azevedo explicitly chose to join GM as a defendant under Fed. R. Civ. P. 19(a)—a
25 more difficult standard to meet than that available under Fed. R. Civ. P. 20(a)'s permissive
26 joinder provision; that provision does not require a finding that the party to be joined be either
27 necessary or indispensable. See FED. R. CIV. P. 20(a). However, even if the Court were to
28 construe Azevedo's effort to bring GM into this action as an attempt to join GM under the more

1 forgiving joinder analysis of Fed. R. Civ. P. 20, defects in the Complaint would mitigate against
2 allowing the joinder.

3 Fed. R. Civ. P. 20(a) states in relevant part:

4 All persons . . . may be joined in one action as defendants if there is asserted
5 against them jointly, severally, or in the alternative, any right to relief in respect
6 of or arising out of the same transaction, or occurrence, or series of transactions
7 or occurrences and if any question of law or fact common to all defendants will
8 arise in the action. FED. R. CIV. P. 20(a).

9 Fed. R. Civ. P. 20(a) triggers a two pronged analysis: first, a right to relief arising out
10 of the same transaction or occurrence must exist; second, a common question of law or fact
11 must appear. Generally speaking, much of the effort in applying this analysis pertains to the
12 “transaction or occurrence” test. Here, however, a much more elementary flaw exists: no right
13 to relief has been asserted against GM. (Complaint ¶ 5.) Assuming that a right to relief must
14 at least meet the requirements for a sufficiently pled claim under Fed. R. Civ. P. 8(a), then “all
15 the rules require is a ‘short and plain statement of the claim’ that will give the defendant fair
16 notice of what the plaintiff’s claim is and the grounds upon which it rests.” Conley v. Gibson,
17 335 U.S. 41, 47 (1957) (footnote omitted) (quoting FED. R. CIV. P. 8(a)(2)). Here, Azevedo
18 attempts to join a party without asserting a single claim against GM. Instead, he disclaims any
19 interest he might have in GM as a defendant by not requiring an answer of it. (Complaint ¶
20 5.) Consequently, the Court cannot find that GM has been joined to this action under Fed. R.
21 Civ. P. 20(a).

22 **3. Intervention under Fed. R. Civ. P. 24.**

23 The result of Azevedo’s failure to properly join GM as a defendant in this case is that
24 GM’s Answer and Cross-Complaint are tantamount to an unsolicited pleading. This is
25 underscored by the fact that the Complaint states clearly that no answer is required of GM.
26 (Complaint ¶ 5.) Thus, GM, by its Answer and Cross-Complaint, is seeking to enter this action
27 on its own initiative. As a general rule, parties seeking to enter an action on their own initiative
28 must do so by filing a motion to intervene pursuant to Fed. R. Civ. P. 24(c). Spanger v.
Pasadena City Bd. of Educ., 552 F.2d 1326, 1329 (9th Cir. 1977). Even if the court were to

1 allow persons not a party to the litigation to participate at some stage of the proceedings, this
 2 will usually not eliminate the need for the party to seek formal intervention. Id. Fed. R. Civ.
 3 P. 24(c) requires that a motion to intervene “state the grounds [for intervention] and be
 4 accompanied by a claim or defense for which intervention is sought.” FED. R. CIV. P. 24(c).
 5 Here, GM replied to Plaintiff’s Complaint by way of an Answer and Cross Complaint. Nowhere
 6 did GM state the grounds for intervention. Thus, GM did not comply with the procedural
 7 requirements of Fed. R. Civ. P. 24(c). Therefore, the Court cannot find that GM has become
 8 a party to this action on the basis of an independent intervention.

9 The foregoing discussion makes clear that GM has not been made a party to this action
 10 under either Fed. R. Civ. P. 19(a), 20(a) or 24(c). Thus, at this stage, the Court finds that GM
 11 is a nonparty to this action. The only question that remains is what effect GM’s nonparty
 12 status has on the viability of its Answer and Cross-Complaint under Fed. R. Civ. P. 12(f).

13 **4. Fed. R. Civ. P. 12(f).**

14 Fed. R. Civ. P. 12(f) states:

15 Upon motion made by a party before responding to a pleading . . . the court may
 16 order stricken from a pleading any insufficient defense or any redundant,
 immaterial, impertinent, or scandalous matter. FED. R. CIV. P. 12(f).

17 _____ Under Fed. R. Civ. P. 12(f), motions to strike allegations of a complaint may be granted
 18 where matters are unrelated to the pleader’s claims, and that the moving party would be
 19 prejudiced if the allegations in the pleading were to remain. Cumis Ins. Soc’y, Inc. v. Peters,
 20 983 F. Supp. 787, 798 (N.D. Ill. 1997). Prejudice exists when the contested allegation would
 21 confuse the issues, or would by its length and complexity, place an undue burden on the
 22 respondent. Id. It has been established here that GM was never sufficiently made a party to
 23 this litigation. Thus, its Answer and Cross-Complaint were that of a nonparty. As such, they
 24 cannot be considered related to the Pleader’s claims. Moreover, It is hard to consider that an
 25 unsolicited answer and cross-complaint by a nonparty could do anything but confuse issues
 26 in the case. RDK and Transwestern would certainly be prejudiced if they were forced to
 27 defend the superfluous allegations of a nonparty while simultaneously offering a defense to
 28 the actual Plaintiff. Accordingly, the Court finds that GM’s Answer and Cross-Complaint,

1 having been submitted by a nonparty, are both prejudicial and redundant. The Court therefore
2 strikes GM's Answer and Cross-Complaint (#75). GM, however, may file a motion for
3 intervention that meets the requirements of Fed. R. Civ. P. 24, at which time the Court will
4 consider whether GM may be made a party to this action under the applicable rules.

5 **III. CONCLUSION**

6 In accordance with the foregoing,

7 IT IS HEREBY ORDERED that RDK's Motion to Strike GM's Answer and Cross-
8 Complaint and Motion to Dismiss (#91) is granted in part and denied in part. RDK's request
9 to strike GM's Answer and Cross-Complaint is GRANTED. RDK's Motion to Dismiss is denied
10 as moot.

11 IT IS FURTHER ORDERED that GM's Answer and Cross-Complaint (#75) is stricken.

12 IT IS FURTHER ORDERED that Transwestern's Motion to Dismiss GM's Cross-
13 Complaint (#94) is denied as moot.

14 DATED: This 22nd day of December, 2006.

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17 UNITED STATES DISTRICT JUDGE
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